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Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1126~~ 226

STATE OF NEW MEXICO
ex rel., GRINNELL COMPANY, a Colorado Corporation,
GRINNELL COMPANY, INC., a Delaware Corporation,
GRINNELL CORPORATION, a Delaware Corporation,
Petitioner,

vs.

THE HONORABLE D. A. MACPHERSON, JR.,
Judge of Division Four of the District
Court of The Second Judicial District
of the State of New Mexico

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

RODEY, DICKASON, SLOAN, AKIN & ROBB
Attorneys for Petitioner,
First National Bank Building
Albuquerque, New Mexico

JOHN P. EASTHAM, WILLIAM C. SCHAAB,
of Counsel

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THE HONORABLE D. A. MACPHERSON, JR.,
Judge of Division Four of the District
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, State of New Mexico, *ex rel.* Grinnell Company, a Colorado corporation, Grinnell Company, Inc., a Delaware corporation, and Grinnell Corporation, a Del-

aware corporation, hereby respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of the State of New Mexico discharging an alternative writ of prohibition against the above-named respondent and permitting such respondent to take jurisdiction of a tort action against all of the relators on grounds that such relators are subject to the jurisdiction of such respondent court as "one giant operation of one octopus corporation."

Opinions Below

The proceeding below was an original proceeding in the Supreme Court of the State of New Mexico upon a petition for an alternative writ of prohibition. The opinion of that Court ordering the discharge of such writ is reported at _____ N. M. _____, 309 P.2d 981, and a copy thereof is annexed hereto as Appendix A. The order of the respondent trial court denying relators' motions for summary judgment and to quash service of process on Grinnell Company, Inc. and Grinnell Corporation, without opinion, is annexed hereto as Appendix B.

Jurisdiction

The order of the New Mexico Supreme Court here sought to be reviewed was filed on March 29, 1957. A petition for rehearing was not filed. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Section 1257(3).

A further ground on which the jurisdiction of this Court is invoked is the importance of the New Mexico Supreme Court's decision to the national business community. That decision effectively abolishes any distinction between parent and subsidiary or sister corporations for jurisdictional purposes. That decision is without persuasive

precedent in any case, and it stands in direct conflict with decisions of this Court and with principles of law generally deemed well-established. To allow that decision to stand and to be followed by courts in other states will force the national business community to reorganize the basic patterns of distribution and corporate organization developed under prior law and now commonly adopted by firms selling in the national market.

Recognized authorities have noted that, "Recent years especially have seen an increasing use of the subsidiary-parent structure."[1] A Securities and Exchange Commission survey of 1937 disclosed that 98% of all corporations, whose securities were listed on an exchange and registered with the Commission, having assets in excess of $50,000,000 had active subsidiaries. Moreover, 58% of all listed corporations regardless of assets had at least one subsidiary.[2] Although no statistical studies have been made of the growth of the subsidiary-parent structure in years following World War II, the advantages of that structure described in the Douglas article noted below remain applicable:

> "The reasons for the use of this structure are manifold. The increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complitions involved in the purchase of physical assets; the retentior of the good will of an established business unit; the avoidance of taxation; the avoidance of cumbersome management structures; the desire for limited liability, are among the primary motives."

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[1] William O. Douglas, *Insulation From Liability Through Subsidiary Corporations*, Part I, 39 YALE L.J. 193 (1929)

[2] S.E.C., SURVEY OF AMERICAN LISTED CORPORATIONS, PART I (1940).

Accordingly, it may reasonably be concluded that the use of such structure has become increasingly common during the past decade.

The New Mexico Supreme Court's decision below strikes a body blow against the widespread use of marketing subsidiaries in the national business community. That decision holds that process of a state court may run against a foreign corporation *solely* because that corporation has authorized its wholly-owned subsidiary (or sister corporation[3]) doing business in the state to use a tradename also used by it. That Court did not find that the subsidiary was the agent of the foreign corporation, and the record shows that the subsidiary was not assimilated by the parent (or by its sister corporation) or otherwise a sham entity under criteria heretofore universally recognized. Since the right to a tradename associated with a product is commonly granted to dealers in such product, that decision in effect destroys the jurisdictional insulation heretofore granted to a foreign parent corporation through the use of a structure of subsidiaries. Deprivation of such recognized rights flies in the face of due process and other Constitutional requirements and, if followed in other states, will require profound and costly changes in the structures of corporate enterprise.

Repudiation of the established jurisdictional insulation of a parent corporation from the operations of a wholly-owned but truly independent subsidiary not acting as its agent should not be permitted to stand. The changes in the form and manner of doing business in the national community which such repudiation will likely cause will have

[3] The term "sister corporation" is used herein to refer to one of two corporations both of which are wholly-owned subsidiaries of a common parent.

an effect on the values of the national community incommensurate with the value in securing to the tort and subrogation claimants below rights which they long delayed asserting.

Questions Presented For Review

1. May a state court, consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, take and exercise jurisdiction over a foreign corporation solely on the ground that such foreign corporation's wholly-owned subsidiary or sister corporation is doing business in such state and advertises its products under a tradename used by such foreign corporation, without any proof that such subsidiary or sister corporation is the agent of such foreign corporation or is a sham or otherwise not possessed of an independent business existence?

2. May a state court, consistent with the paramount power of the Congress to regulate interstate commerce under Article I, Section 8, Clause 3 of the United States Constitution, create a deterrent to and a burden upon interstate commerce by taking and exercising jurisdiction over a foreign corporation on the ground specified in Question 1?

Constitutional Provisions Involved

1. Amendment XIV to the Constitution of the United States, Section 1, Clause 2: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

2. Constitution of the United States, Article I, Section 8, Clause 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States, . . ."

Statement of the Case

1. *Chronology.* On February 3, 1956, Larnie Schultz and the Hartford Accident and Indemnity Company filed a complaint in the District Court of the Second Judicial District of New Mexico, sitting in Bernalillo County, New Mexico, naming "Grinnell Company" as defendant. (Tr. 1, 54)[4] That complaint sought recovery by Schultz for injuries received on January 11, 1954, and by Hartford, by subrogation, of the amount of its liability to Schultz under the New Mexico Workmen's Compensation Act. Tr. 7) That complaint alleged that the defendant was a foreign corporation authorized to do business in New Mexico, that a metal hanger whose alleged defective condition caused Schultz' injuries was manufactured by the defendant, and that the defendant was negligent in such manufacture. (Tr. 7, 8)

Summons was issued on February 3, 1956 (Tr. 11), and service was made on Grinnell Company's statutory agent in New Mexico. On February 16, 1956, service was also made upon the Secretary of State for the purpose of attempting service upon "Grinnell Company, at its Home Office in Providence, Rhode Island." (Tr. 11, 13) Such service on the Secretary of State admittedly did not comply with the applicable statute authorizing constructive service on unqualified foreign corporations doing business in New Mexico, Section 21-3-6 New Mexico Statutes Annotated 1953. (Tr. 2, 54)

Grinnell Company filed an answer to the complaint on March 14, 1956, in which it admitted that it was authorized to do business in New Mexico but denied that it manufactured the metal hanger in question and set up affirmative

[4] Page numbers refer to the transcript of the record in this case.

defenses. (Tr. 2, 54) Thereafter, that defendant served certain interrogatories and took the depositions of the plaintiff Schultz. (Tr. 57)

On June 18, 1956, the defendant Grinnell Company moved for summary judgment (Tr. 15); Grinnell Company, Inc. moved to quash service of process upon it on the principal ground, shown by affidavit, that it did no business in New Mexico (Tr. 18, 20); and Grinnell Corporation moved to quash service of process upon it on the same principal ground (Tr. 23, 25). On June 26, 1956, the plaintiffs served interrogatories upon Grinnell Company (Tr. 27), Grinnell Company, Inc. (Tr. 34), and Grinnell Corporation (Tr. 37). Those corporations filed answers thereto, which are annexed hereto as Appendices C, D, and E, respectively (Tr. 40-51). On October 4, 1956, the trial court denied each of the aforesaid motions without opinion. (Tr. 52)

On October 17, 1956, a petition for writ of prohibition was filed in the New Mexico Supreme Court. (Tr. 1) That Court on October 17, 1956, issued its alternative writ of prohibition to the respondent herein. (Tr. 53) The respondent's response to that petition was filed on October 31, 1956. (Tr. 54) On March 29, 1957, the Court filed its order (Tr. 106) and opinion (Tr. 91) discharging the alternative writ. Notice of the filing of this Petition was filed on April 18, 1957. (Tr. 106)

2. *Material Facts.* The pertinent facts, either admitted or clear and uncontradicted on the record, may be summarized as follows:

(a) Grinnell Company is a Colorado corporation qualified to do and doing business in New Mexico. It neither manufactured nor sold the metal hanger alleged to have caused Schultz' injury. (Tr. 16)

(b) Grinnell Company, Inc. is a Delaware corporation not qualified to do business in New Mexico and not in fact doing business therein. It sold the metal hanger in question to Schultz' employer but did not manufacture it. (Tr. 20)

(c) Grinnell Corporation is a Delaware corporation not qualified to do business in New Mexico and not in fact doing business therein. It manufactured the metal hanger and sold it to Grinnell Company, Inc. (Tr. 25)

(d) Grinnell Company and Grinnell Company, Inc. are both wholly-owned subsidiaries of Grinnell Corporation, and the directors and executive officers of the subsidiaries are also directors and executive officers of the parent. The home offices of the subsidiaries are located at the same address as the home office of the parent. (Tr. 41, 49)

(e) The subsidiaries employ and pay their own employees, none of whom is an employee of the parent. (Tr. 50)

(f) Each subsidiary conducts its own business, which is entirely separate and distinct from the other's and from the parent's. The parent is engaged in manufacturing; the subsidiaries do not manufacture, but sell in their respective trade territories goods purchased by them from the parent and other manufacturers. (Tr. 41, 49)

(g) Each subsidiary owns and maintains its separate books, records, and bank accounts. (Tr. 41)

The respondent failed to introduce any facts contrary to the foregoing, nor did he attempt to discover by interrogatories whether the subsidiaries were inadequately capitalized and financed, whether the day-to-day operations of their businesses were kept separate from each other and from the parent's, whether the formalities of corporate independence were regularly observed in such circumstances as meetings of the boards of directors of the respective corporations. Accordingly, the separation of the three corporations in those respects should be taken as true for purposes of this proceeding.

The sole evidence relied upon by the respondent and by the Supreme Court below to support its decision is the fact that the three companies use the trademark or name "Grinnell" in connection with the advertisement of products manufactured by Grinnell Corporation. There was, however, no showing that either Schultz or his employer had ever seen any such advertising, that the use of that tradename to identify the offices to which sales inquiries or orders should be directed by customers was relied upon in any respect by Schultz or his employer, or that either was misled by such advertising to believe that a single corporation was involved.

3. *Constitutional Questions Raised Below.* The Constitutional questions sought to be reviewed are implicit in the very nature of a proceeding for a writ of prohibition against the exercise of jurisdiction over a foreign corporation. Those questions were first expressly raised by Petitioner in the Reply Brief, as follows:

> "Instead of focusing his argument on the vital point at issue, respondent has attempted to cloud the *applicable legal principles relating to the due process requirements of personal service on and jurisdiction*

> *over foreign corporations.* He cites *International Shoe Company v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945), for the proposition that 'doing business' is no longer a constitutional requirement for jurisdiction over a foreign corporation (Answer Brief 10, 11). Clearly, the respondent has misinterpreted the *International Shoe* case, although he cites *French v. Gibbs*, 189 F. 2d 787 (2nd Cir. 1951), and *Latimer v. S/A Industries Reunidas*, 175 F. 2d 184 (2nd Cir. 1949), in which that case is clearly explained by Judge Learned Hand."

Those questions were also passed upon by the New Mexico Supreme Court in its opinion, as follows:

> "A more liberal policy has grown up over the years with respect to what affords due process as to a foreign corporation doing business in another state than that of its creation. Especially is this true in setting up criteria by which its activities are to be judged in a determination whether it is doing business within a sister state, so as to subject it to suits in the courts of such state. See the illuminating opinion of Mr. Chief Justice Stone in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057, and annotation at 1068."

POINT I

Exercise of Jurisdiction by the Respondent Court over Grinnell Corporation and Grinnell Company, Inc. Violates the Rights of Those Corporations Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as Heretofore Interpreted by this Court.

Long ago, in *St. Clair v. Cox*, 106 U.S. 350, 27 L. Ed. 222, 1 S. Ct. 354 (1882), this Court held the doctrine of

Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed 565 (1877); applicable to foreign corporations. It is now fundamental that a state court may not constitutionally acquire or exercise *in personam* jurisdiction over a foreign corporation unless the corporation "consents" thereto, is "present" or "found" within the state, is "doing business" within the state, or has "certain minimum contacts" with the state so as to make fair and reasonable the exercise of such jurisdiction. A foreign corporation having "no contacts, ties, or relations" with the forum state may not, consistently with due process requirements, be subjected to the jurisdiction of the courts of such state. *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945).

In this case it is not contended by respondent that Grinnell Corporation or Grinnell Company, Inc. have any "contacts, ties, or relations" with New Mexico, except through Grinnell Company. That corporation is a subsidiary of Grinnell Corporation and a sister corporation of Grinnell Company, Inc.

The most recent decision of this Court directly on the question of whether a foreign corporation may constitutionally be subjected to the jurisdiction of a state with which its only contact lies in its relations with its wholly-owned subsidiary is *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 69 L. Ed. 634, 45 S. Ct. 250 (1925). In that case a North Carolina contract claimant brought an action in a North Carolina court against Cudahy Packing Company, a Maine corporation, and effected service of process upon the statutory agent in North Carolina of Cudahy Packing Company of Alabama, an Alabama corporation maintaining an office and doing business in North Carolina, which was a wholly-owned subsidiary of the Maine corporation. The defendant removed the action to the Federal court and moved

to set aside summons and dismiss the action for lack of jurisdiction. On appeal from the granting of that motion, this Court affirmed.

The opinion of Mr. Justice Brandeis in that case points out that the subsidiary was "immediately and completely" dominated by the parent, which employed the subsidiary as its "instrumentality" for marketing its products in North Carolina:

> "The Alabama corporation, which has an office in North Carolina, is the instrumentality employed to market Cudahy products within the state; but it does not do so as defendant's agent. It buys from the defendant and sells to dealers. In fulfilment of such contracts to sell, goods packed by the defendant in Iowa are shipped direct to dealers; and from them the Alabama corporation collects the purchase price. Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other states. The existence of the Alabama company as a distinct corporate entity is, however, in all respects, observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation from the general Cudahy business was doubtless adopted solely to secure to the defendant some advantage under the local laws."

Because the subsidiary was not an agent of the parent and its business had not been assimilated by the parent, this Court held that the subsidiary, though merely formally separate from the parent was "real" and "not pure fiction". Accordingly, there was no ground on which to establish jurisdiction over the parent solely on the basis of its relation to its subsidiary.

The doctrine of the *Cudahy* case was thereafter applied by this Court in *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85, 77 L. Ed. 1047, 53 S. Ct. 529 (1933). That case came up on an appeal from an order of the Supreme Court of Wisconsin discharging an alternative writ of prohobition, and it is procedurally similar to this case.

This Court has most recently cited the *Cudahy* case with approval in *National Carbide Corp. v. Commissioner*, 336 U.S. 422, 93 L. Ed. 779, 69 S. Ct. 726 (1949), for the proposition that the "owner" of a subsidiary is not thereby subject to service of process. *Cudahy* has never been overruled nor criticized by this Court. It is a foundation stone in the legal architecture of our society and should be determinative of this case.

The New Mexico Supreme Court distinguished the *Cudahy* case on the grounds that Grinnell Corporation (and presumably Grinnell Company, Inc.) was not sufficiently separate from Grinnell Company to fall within the *Cudahy* doctrine. The opinion cites an article at 56 Columbia Law Review 394, which in turn cites *Gray v. Eastman Kodak Co.*, 53 F. 2d 864 (E.D. Pa. 1930). That case, however, is not in point because the court there held in accordance with *Cudahy*, stating:

> ". . . . The doctrine of the Cannon and other cases is that the inference of the maintenance of a place

> of business or of an office by a given defendant cannot be inferred alone from its practical control of the business through stock ownership or otherwise. *There must be evidence that the served defendant itself maintained the office or place of business.*" [Italics added.]

The court found that the named defendant in fact maintained an office in the jurisdiction of the forum. Such a finding was not and could not have been made in this case by the New Mexico Court because none of the relator corporations maintains *any* business establishment in *New Mexico*.

There is clearly no basis in the record of this case or in the opinion of the New Mexico Court to distinguish *Cudahy*. Though the directors and executive officers of Grinnell Company and Grinnell Company, Inc. be the same as Grinnell Corporation, that was true of Cudahy Packing Company and Cudahy Packing Company of Alabama. Decisive is the fact that each relator corporation maintains its own books and records, employs and pays its own employees, and otherwise operates independently. The subsidiaries purchase the goods of the parent and other suppliers for resale as dealers; they do not act as agent. It has not been alleged or argued by respondent that they are not adequately financed and capitalized, that their day-to-day business is not conducted separately, or that the formalities of separate corporate existence and actions are not carefully observed in such matters as meetings of their respective boards of directors.

The New Mexico Court's decision actually rests *solely* upon the content of a single advertising brochure and a catalog of "Grinnell" products. Clearly, the use of the trade-name "Grinnell" is not evidence of assimilation of otherwise

separate businesses. In *Cudahy* this Court stated that the subsidiary was used as an "instrumentality" to market "Cudahy products," yet sustained the jurisdictional insulation of the parent. Sale of "Grinnell products" by Grinnell Company and Grinnell Company, Inc. under identical circumstances should have no different effect.

Mere reference in advertising to "the Grinnell of today" or other words referring to the overall enterprise or "system" should not be deemed sufficient to support a finding that otherwise separate businesses have been assimilated. There is no showing in this record that either Schultz or his employer was aware of such advertising or relied thereon. *Cf. Bergenthal v. State Garage & Trucking Co.*, 179 Wis. 42, 190 N.W.901 (1922); *Berkey v. Third Avenue Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926); *Stone v. C.C.C. & St. L. Ry.*, 202 N.Y. 352, 95 N.E. 816 (1911); and the illuminating discussion thereof in Douglas, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 197, 198 (1929).

The following statement quoted by the New Mexico Court from the "Grinnell" catalog:

> "Through *its* Supply Sales Division, which operates *its* Branch Warehouses, *the Company* sells both Grinnell manufactured and purchased piping products to a wide variety of customers, . . ." [Italics added.]

shows only that Grinnell Company, Inc. (the publisher and copyright owner of the catalog) conducts an independent business and operates *its* Branch Warehouses through *its* Supply Sales Division entirely separate from Grinnell Corporation, the manufacturer, and Grinnell Company, its sister corporation. Certainly that statement cannot support

a conclusion that the business of Grinnell Company, Inc. has been assimilated by its parent or by its sister corporation.

Since *Cudahy* cannot reasonably be distinguished from this case, denial of the writ of certiorari or otherwise allowing the decision below to stand will virtually destroy the *Cudahy* doctrine and cause confusion in the business community. The *Cudahy* doctrine represents sound policy and should be reaffirmed. The virtue of the *Cudahy* doctrine is the flexibility it makes possible in the form and manner of business organization. It permits corporate management to choose among alternatives the form of corporate structure suited to the particular line of business or to a particular operation with sure knowledge of the effect of the choice on the distribution of business risks. Thus, certain operations or product lines may most efficiently be conducted by a single corporate organization, while other operations may be conducted through a series of separate corporate entities with more efficiency and less risk to the enterprise as a whole. The *Cudahy* doctrine frankly recognizes that a subsidiary corporation conducting an independent business in its own right will provide jurisdictional insulation for the parent, just as the corporate form itself provides jurisdictional insulation and limited liability for individual stockholders.

The decision of this Court in the *International Shoe* case announcing new criteria for determining when a corporation having *some* "contacts, ties, or relations" with the forum through its agents may be subjected to jurisdiction, makes desirable the present reaffirmance of the *Cudahy* doctrine. It should be made completely clear that the *Cudahy* doctrine remains the constitutional law of the land, and that a corporation may not be sued in a jurisdiction with which it has *no* "contacts, ties, or rela-

tions" except through its wholly-owned subsidiary, notwithstanding that a local court might deem such exercise of jurisdiction greatly to the "convenience" of, or in the interests of "substantial justice" to, a local claimant.

If the decision of the New Mexico Court is allowed to stand the *Cudahy* doctrine will be, in effect, overruled. That decision holds that mere use of a common tradename for advertising purposes is sufficient to obliterate any distinction between parent and subsidiary or between sister corporations. Since the use of tradenames, *e.g.*, "Ford," "Coca-Cola," "Hart, Schaffner & Marx," is common in the national market, the jurisdictional insulation provided by the *Cudahy* doctrine will for all practical purposes be destroyed.

POINT II

Exercise of Jurisdiction by the Respondent Court over Grinnell Corporation and Grinnell Company, Inc. Conflicts with the Paramount Power of Congress Under the Commerce Clause of Article I, Section 8, Clause 3 of the Constitution of the United States as Heretofore Interpreted by this Court.

Even if Grinnell Corporation and Grinnell Company, Inc. should be deemed to have some "contacts, ties, or relations" with New Mexico so as to satisfy minimal due process requirements, maintenance of suit against them in that jurisdiction would impose oppressive and unreasonable burdens upon the interstate commerce conducted by those corporations in violation of the Commerce Clause.

In *Michigan Central R. Co. v. Mix*, 278 U.S. 492, 73 L. Ed. 470, 49 S. Ct. 207 (1929), this Court reversed an order of the Supreme Court of Missouri dismissing a peti-

tion for an alternative writ of prohibition against a state court, in which the railroad had been sued by a local resident for damages for an accident occurring in Michigan. The railroad did not operate any line in Missouri and was not qualified to do or doing any business there, other than "soliciting freight for transportation in interstate commerce." This Court's decision rested upon the "heavy burden" imposed on interstate commerce by permitting such actions, minimal requirements of due process having apparently been satisfied by service on the railroad's soliciting agent.

The *Mix* case was followed by this Court in *Denver & Rio Grande W. R. Co. v. Terte,* 284 U.S. 284, 76 L. Ed. 295, 52 S. Ct. 152 (1932), in holding a suit in Missouri by a resident of that state against a railroad doing no other business in Missouri than soliciting traffic to recover for injuries sustained in Colorado unreasonably burdensome upon interstate commerce. That case also came up on appeal from a denial by the Missouri Court of an alternative writ of prohibition.

Both the *Mix* and *Terte* cases were thereafter cited with approval by this Court in *Baltimore & Ohio R. Co. v. Kepner,* 314 U.S. 44, 86 L. Ed. 28, 62 S. Ct. 6 (1941), and in *Miles v. Illinois Central R. Co.,* 315 U.S. 698, 86 L. Ed. 1129, 62 S. Ct. 827 (1942).

The doctrine of those cases is applicable here. The state court action instituted by Schultz and the insurer sought recovery for injuries sustained in New Mexico, but the grounds for recovery alleged (1) negligence in the manufacture of the metal hanger, and (2) a warranty of its fitness for use by the seller thereof. Since neither the manufacture of the hanger by Grinnell Corporation nor its sale

by Grinnell Company, Inc. occurred in New Mexico, suit against those corporations in New Mexico will constitute an oppressive and unreasonable burden upon interstate commerce in the products manufactured and sold by them within the purview of the *Mix* and *Terte* cases.

Moreover, if the *Cudahy* doctrine is repudiated by allowing the decision of the New Mexico Supreme Court to stand, the consequences will create a real and oppressive burden on national business corporations operating in the national market through subsidiaries. The existing corporate structure of large businesses is based upon a careful allocation of business risks, which the certainty afforded by the *Cudahy* doctrine makes possible. Abrogation of that doctrine will require fundamental changes in structure to compensate for the additional uncertainty and risk created thereby. Such changes will be expensive and troublesome to devise and carry out; they will create burdens far exceeding any burden arising from the *inconvenience* thought decisive by this Court in the *Mix* and *Terte* cases.

POINT III

The Decision of the New Mexico Supreme Court is Without Precedent and is Contrary to Decisions of this Court and Other Federal Courts.

The cases cited by the New Mexico Supreme Court as "ample authority" to support its decision do not in fact do so. Moreover, its decision is contrary to the *Cudahy* case and to many other Federal decisions. Set forth under this point are brief statements showing the grounds for distinguishing cases cited by that court and brief citations of the pertinent Federal cases contrary thereto.

Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 108 A.2d 372, 49 A.L.R. 2d 646 (1954), *cert. denied* 348 U.S. 943, involved the constitutionality of a Maryland *statute* subjecting to suit by residents any foreign corporation on claims arising out of a contract made in Maryland or a tort committed in that state. The coroprate defendant was a Panamanian corporation not doing any business in the United States, except that the contract on the basis of which suit was brought had been made in Maryland. The court sustained the constitutionality of that statute relying upon an analogy to non-resident motorist statutes and upon the existence of the "minimum contacts" required by the *International Shoe* case.

That case is completely irrelevant here. For it is admitted by all parties that Grinnell Company is "doing business" in New Mexico and has appointed an agent in that state to receive service of process. The question here is rather whether Grinnell Corporation and Grinnell Company, Inc., which admittedly have *no* "contacts, ties, or relations" with New Mexico apart from their c rporate relationship to Grinnell Company, may be subjected to the jurisdiction of New Mexico through service of process on Grinnell Company.

Pergament v. Frazer, 93 F. Supp. 9 (E.D. Mich. 1949), was a denial of a motion to dismiss a complaint in a stockholder's action against the parent where service was had on a subsidiary on the grounds that sufficient facts had not been shown by the defendant to rebut plaintiff's showing that the parent treated the subsidiary as its "sales agent." The court stated, in pertinent part:

> ". . . The test of whether or not the parent is actually doing business in Michigan so as to subject its subsidiary to process bringing the parent company

within the jurisdiction lies in the facts as they are developed and we have not sufficient of these facts before us.

". . . It is possible and permissible for a corporation not to desire to do business in a certain state and to create a separate corporation for that purpose.
". . . the facts when finally before this court in detail might be sufficient to sway the court's present opinion to an opposite holding."

Clover Leaf Freight Lines, Inc. v. Pacific Coast Wholesalers Assn., 166 F.2d 626 (7th Cir. 1948), is completely irrelevant here. Service on a subsidiary was there held service on the parent on grounds of a clear *agency relation* between the corporations. There are *no* facts in the record of this case from which there could be inferred any agency relation between Grinnell Company and its parent and sister corporations, and the New Mexico Supreme Court did not so find.

Bach v. Friden Calculating Machine Co., 167 F. 2d 679 (6th Cir. 1948), is clearly distinguishable on the grounds that the *individual* served with process was on the proven facts an *agent* of the corporation.

S. O. S. Co. v. Bolta Co., 117 F. Supp. 59 (N. D. Ill. 1953), is distinguishable on the grounds that the "management contract," referred to in the excerpt quoted in the New Mexico Court's opinion, deprived the subject corporations of any real existence. Under that contract the dominant corporation provided "personnel, management, clerical, accounting, secretarial, purchasing, production, planning, shipping, receiving and warehouse services" in consideration of 4% of the servient corporations' net sales. Such domination represents complete assimilation of the

business of the servient corporations; no such facts are shown on this record.

General Electric Co. v. Masters Mail Order Co., 122 F. Supp. 797 (S. D. N. Y. 1954), is distinguishable on the grounds that the sister corporation on which process was served clearly acted as the agent of the defendant.

Industrial Research Corp. v. General Motors Corp., 29 F. 2d 623 (N.D. Ohio 1928), is distinguishable on grounds that the defendant was purely a holding company engaged in no actual business except through subsidiaries, and that the defendant showed no facts indicating that the subsidiaries were independent in the conduct of their respective businesses.

Fish v. East, 114 F. 2d 177 (10th Cir. 1940), is not in point because it did not involve a question of jurisdiction but of "substantive rights." See *Cannon Mfg. Co. v. Cudahy Packing Co.*, *supra*.

Sterling Novelty Corp. v. Frank & Hirsch Distributing Co., Ltd., 299 N.Y. 208, 86 N.E. 2d 564 (1949), is not in point because the corporation there served with process was admittedly the *agent* of the defendant.

Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 214 P. 2d 541 (1950), is similarly not in point because the court there held the "jobbers" on whom process was served "clearly act as agents of petitioner" on the basis of facts not here present.

Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P. 2d 968 (1952), *cert. denied* 344 U.S. 897, is not in point because it was there shown that the foreign corporation maintained its *representative* in the state to solicit business. The sole question there was whether the nature and quality

of the representative's activity was sufficient to support jurisdiction.

Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Assn., 247 U.S. 490, 62 L. Ed. 1229, 38 S. Ct. 553 (1918), was held to have "no application" to the jurisdictional question here presented by this Court in the *Cudahy* case.

Blum v. Postal Telegraph, Inc., 54 F. Supp. 898 (W. D. Pa. 1944), is distinguishable on the ground that the facts there showed that the subsidiary did not have its own employees, was not independent financially or adequately capitalized, and filed consolidated financial statements and reports with Federal agencies. Moreover, the parent was a mere holding company conducting no business except through its subsidiaries. Such facts are not present in this record.

Satterfield v. Lehigh Valley R. Co., 128 F. Supp. 669 (S.D.N.Y. 1955), is not in point because the local sales company on which process was served was clearly the *agent* of the foreign corporation, as the excerpt quoted by the New Mexico Court clearly states. The sole question there was whether the activities of that agent were sufficient to support service under the doctrine of *International Shoe*.

Bishop v. U.S., 16 F.2d 410 (8th Cir. 1926), is a case involving "substantive rights" not applicable to the jurisdictional question here involved.

In contrast to the foregoing cases, which are either wholly irrelevant or depend for applicability on facts not existing on the record of this case, the following cases have followed the *Cudahy* case in upholding the jurisdictional insulation of a parent corporation where its subsidiary does not act as its agent and where the business independence of the subsidiary is carefully maintained. *Austad v. U.S.*

Steel Corp., 141 F. Supp. 437 (N.D. Cal. 1956); *Harris v. Deere & Co.*, 128 F. Supp. 799 (E.D.N.C. 1955); *Bergholt v. Hudson Motor Car Co.*, 124 F. Supp. 716 (D. Minn. 1954); *Terry Carpenter, Ltd. v. Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954); *Dam v. General Electric Co.*, 111 F. Supp. 342 (E. D. Wash. 1953); *Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co.*, 193 F. 2d 158 (9th Cir. 1951); *Echeverry v. Kellogg Switchboard & Supply Co.*, 175 F. 2d 900 (2nd Cir. 1949); *Lane v. Maple Leaf Milling Co. Ltd.*, 87 F. Supp. 741 (S.D.N.Y. 1949); *Amtorg Trading Corp. v. Standard Oil Co. of Calif.*, 47 F. Supp. 466 (S.D.N.Y. 1942); *Moorhead v. Curtis Publishing Company*, 43 F. Supp. 67 (W.D.Ky. 1942); *McLean v. Goodyear Tire & Rubber Company, Inc.*, 85 F.2d 150 (5th Cir. 1936); *Walker v. Ritter-Burns Lumber Co.*, 10 F. Supp. 804 (E.D. Ky. 1935); *Mas v. Nu-Grape Co. of America*, 62 F.2d 113 (4th Cir. 1932).

Although those Federal court decisions, which are in point here, were cited to the New Mexico Court, that Court ignored those cases in reaching its result. Those cases and this Court's decision in *Cudahy* should be determinative of this case; failure of the New Mexico Court even to consider those Federal cases indicates the utter groundlessness of its decision.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully Submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB
Attorneys for Petitioner,

First National Bank Building
Albuquerque, New Mexico

JOHN P. EASTHAM, WILLIAM C. SCHAAB,
of Counsel

APPENDIX A

309 P(2) 981

STATE of New Mexico, ex rel. GRINNELL COMPANY, a Colorado Corporation, Grinnell Company, Inc., a Delaware Corporation, Grinnell Corporation, a Delaware Corporation, Petitioners,

v.

The Honorable D. A. MacPHERSON, Jr., Judge of Division Four of The District Court of The Second Judicial District of The State of New Mexico, Respondent.

No. 6174

Supreme Court of New Mexico.

March 29, 1957.

Original prohibition action against D. A. MacPherson, Jr., Judge of Division Four of the District Court of the Second Judicial District, based on alleged improper service of process. The Supreme Court, Sadler, J., held that where three foreign corporations, a parent manufacturing corporation and its two subsidiary selling corporations which had common directors and secretary and bore same basic name were in fact a giant octopus corporation, so that in advertising and sales, there was no distinction between manufacturer corporation and selling corporations, service of process upon the one selling corporation which was qualified to do business in state was sufficient to confer jurisdiction over the other two corporations.

Alternative writ discharged.

1. Corporations

In prohibition proceeding based on alleged insufficiency of service upon corporation, evidence compelled conclusion that parent manufacturing corporation and two subsidiary

selling corporations with same board of directors and secretary and bearing same basic name, with manufacturer designated as "corporation", first seller designated as "company, incorporated", and second seller designated "company", were in fact one giant octopus corporation. 1953 Comp. § 21-3-6(b).

2. Corporations

Where three foreign corporations, a parent manufacturing corporation and its two subsidiary selling corporations which had common directors and secretary and bore same basic name were in fact a giant octopus corporation, so that, in advertising and sales, there was no distinction between manufacturing corporation and selling corporations, service of process upon the one selling corporation which was qualified to do business in state was sufficient to confer jurisdiction over the other two corporations. 1953 Comp. § 21-3-6(b).

—o—

Rodey, Dickason, Sloan, Mims & Akin, Albuquerque, for petitioners.

Simms, Modrall, Seymour, Sperling & Roehl, Thomas J. Smiley, Albuquerque, for respondent.

Opinion

SADLER, Justice.

The relators seek by prohibition to restrain the respondent judge from proceeding in a case pending before him in the district court of Bernalillo County, entitled "Larnie Schultz and Hartford Accident and Indemnity Co., plaintiffs, v. Grinnell Company, defendant," and numbered 63,674 on the civil docket of said court. We granted an alternative writ

upon the filing and presentation of the petition therefor and the matter is now before us in a test of whether the alternative writ was improvidently issued. It will be necessary to state the facts in order to ascertain this fact.

On January 11, 1954, the plaintiff, Larnie Schultz, was employed as a steam fitter by the Flori Piping Erection Company of St. Louis, Missouri, and was working on the construction of the R. E. A. Electrical Plant at Algodones, New Mexico (also called the Plains Electric Generation and Transmission Co-op, Inc.). On the date mentioned while Schultz was astraddle a steel pipe approximately 16 feet above the floor level, the pipe fell to the ground and he along with it, as a result of which he was injured.

At the time of the fall the workmen's compensation insurer of Schultz' employer was the Hartford Accident and Indemnity Company. Since the date of his injury, the insurer has been paying compensation to Schultz in the amount of $30 per week and furnishing medical benefits. Some two years later, on February 3, 1956, Schultz and the insurer, who will be referred to herein as "Hartford", filed suit against Grinnell Company for Schultz' personal injuries and reimbursement to Hartford for compensation benefits previously paid. The complaint alleges that the fall was caused by a defective or faulty metal hanger "manufactured, fabricated or made" and "warranted" by the defendant, Grinnell Company, "a foreign corporation * * * authorized to do business in the State of New Mexico." This hanger is also referred to in the pleadings as an "I-beam" or "pipe hanger."

The Grinnell Company, the named defendant in cause

No. 63,674, is a Colorado corporation with its principal place of business in Denver. It is duly qualified to do business in New Mexico. Service was made on said defendant through its authorized statutory agent, John T. Watson. Purported service was also made on the secretary of state as agent for the Grinnell Company, Inc., and for Grinnell Corporation, pursuant to section 21-3-6(b) which section governs service on foreign corporations doing business in New Mexico but not authorized or qualified to do business in this state. This latter service was made on February 16, 1956. The only affidavit filed with the secretary of state upon such service is attached to the petition for the writ as Exhibit "C."

On March 14, 1956, an answer was filed by the defendant admitting that it was authorized to do business in New Mexico, denying that it manufactured or fabricated the alleged defective metal hanger, and setting up the usual affirmative defenses.

On June 18, 1956, certain pleadings were filed below as follows:

(a) Defendants' motion for summary judgment with affidavit attached thereto, the grounds for such motion being that defendant was not a manufacturer but a distributor of products manufactured by the manufacturing corporation and others, that it did not manufacture the metal hanger as alleged in the complaint, nor did it sell the same to plaintiff Schultz' employer at the time of the accident, Flori Piping and Erection Company.

(b) Grinnell Company, Inc.'s motion to quash purported service of process on the secretary of state as its agent

with affidavit attached thereto asserting that: (1) the process or summons served upon the secretary of state was directed to "Grinnell Company," a separate corporate entity from Grinnell Company, Inc.; (2) an affidavit by the person to whom process was delivered for service was not filed in the office of the secretary of state as required by section 21-3-6(b), 1953 Comp.; (3) Grinnell Company, Inc., did not do business within the state of New Mexico.

(c) Grinnell Corporation's motion to quash purported service of process on the secretary of state as its agent with affidavit attached thereto on the ground that: (1) the process or summons served upon the secretary of state was directed to "Grinnell Company," a separate corporate entity from Grinnell Corporation; (2) the affidavit by the person to whom process was delivered for service was not filed in the office of the secretary of state as required by section 21-3-6(b), 1953 Comp.; (3) Grinnell Corporation did not do business within the state of New Mexico.

On June 29, 1956, plaintiffs below filed separate interrogatories directed to Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation, respectively. Copies of the interrogatories were attached to the petition herein as exhibits. Thereafter, on August 31, 1956, Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation filed separate answers to certain of the interrogatories referred to above and objected to others, said objections relating primarily to interrogatories involving insurance. Copies of the answers also were attached as exhibits to the petition herein.

On October 4, 1956, the motions to quash referred to

above as well as motion for summary judgment by defendant, Grinnell Company, came on for hearing and each, in turn, was denied.

There follow certain allegations in the petition for the writ by the defendant Grinnell Company in which it denies that it either manufactured or sold the allegedly defective metal hanger; that certain metal hangers were sold to plaintiff's employer, Flori Piping Erection Company, by Grinnell Company, Inc., in St. Louis, Missouri, and shipped from that point by the branch office of Grinnell Company, Inc., to the Flori Piping Company of Algodones, New Mexico, where said metal hangers were in fact delivered to the latter company. That said metal hangers were made and fabricated by Grinnell Corporation.

It is further alleged in the petition for the writ that Grinnell Company, Inc., is a foreign corporation, not authorized or qualified to do business in New Mexico, nor actually so engaged at any material time; that Grinnell Corporation is likewise a foreign corporation, not authorized or qualified to do business in New Mexico, nor actually so engaged at any material time; that Grinnell Company and Grinnell Company, Inc., are wholly owned subsidiaries of Grinnell Corporation and that all three corporations are separate legal entities; that three directories of Grinnell Corporation constitute the entire board of directors of Grinnell Company and Grinnell Company, Inc.

It is further alleged in the petition for the writ that the defendant, Grinnell Company, while a foreign corporation, is authorized and qualified to do business in New Mexico. The petition goes on to allege that the books and records of

Grinnell Company are kept entirely separate from the books and records of the Grinnell Corporation and that all employees of Grinnell Company are paid solely by it and receive no compensation from Grinnell Corporation.

[1, 2] The respondent admits most of the allegations of the petition but specifically denies that respondent is without jurisdiction over Grinnell Company, Inc. and Grinnell Corporation, alleging, affirmatively, that the three Grinnell corporations are actually and in fact, "one giant operation of one octopus corporation and as such are amenable to process in New Mexico."

A review of testimony taken on interrogatories in depositions to the parties, being officers of the three separate corporations, Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation, along with exhibits attached to depositions, and admissions to be deduced from the pleadings, is sufficient, as we view the matter, to sustain the charge in the answer, or response to the writ, filed on behalf of the respondent, in this prohibition proceeding:

> "That the three Grinnell Corporations are actually and, in fact, one giant octopus corporation and as such are amenable to process in New Mexico."

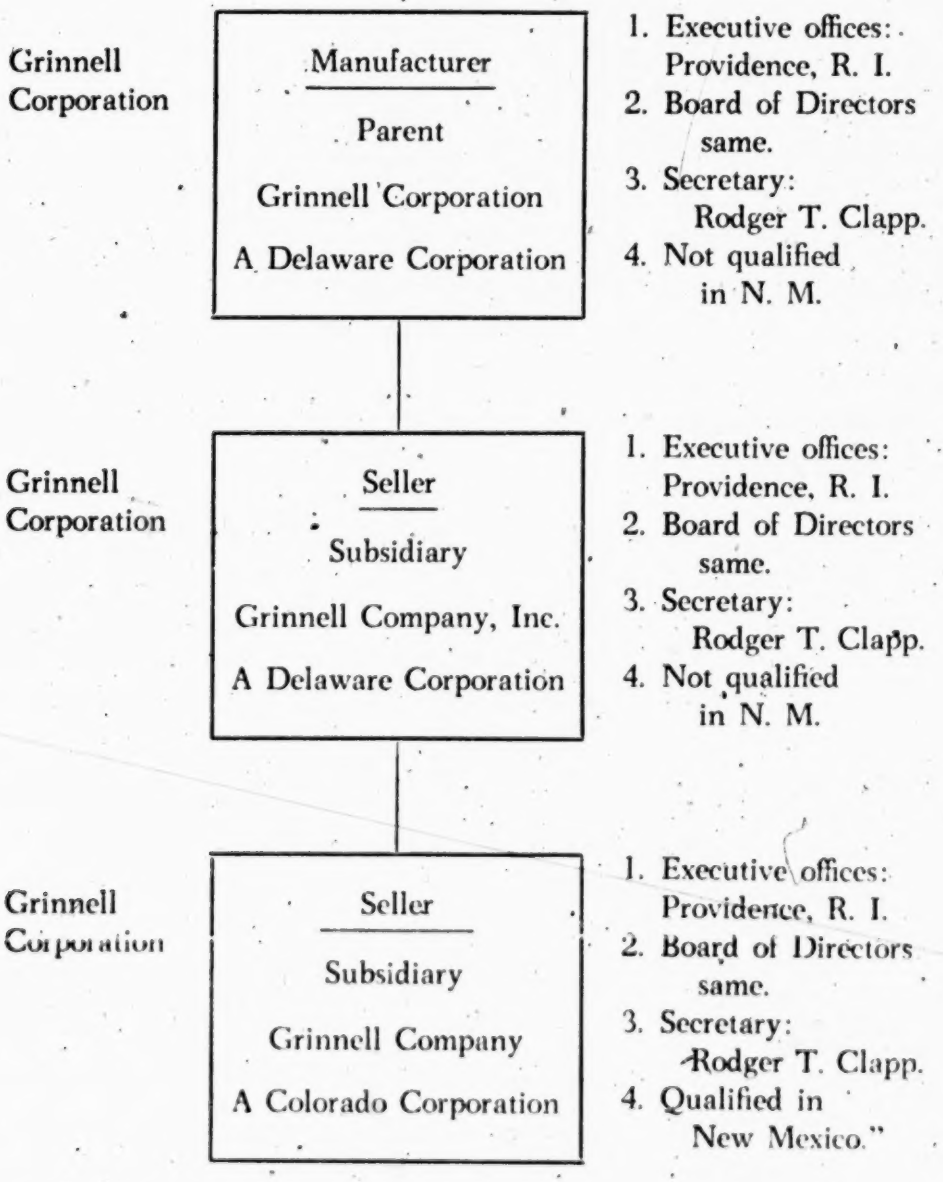
There are so many facets to the widespread operations of the three separate corporations that it would be quite burdensome to attempt an enumeration of all of them. We shall, however, mention some of the more prominent of those leading us to the conclusion announced.

For instance, we shall appropriate Exhibit 16, attached to the brief of respondent, as entitled and reproduced therein. It follows:

Appendix A.

"Exhibit 16

Diagram Graphically Showing the Organization and Relationship of the Grinnell Corporations



As disclosed by Exhibit 16 attached to the answer brief of respondent, and reproduced next above, the Grinnell Corporation, the parent corporation, maintains its executive offices at Providence, Rhode Island, and so do Grinnell Company and Grinnell Company, Inc. All three have the same board of directors, the same secretary, share the same executive offices. The only difference noted by the exhibit, supra, lies in the fact that Grinnell Company has been duly qualified to do business in New Mexico, whereas, Grinnell Company, Inc., and Grinnell Corporation have not. The relators' response to an interrogatory No. 3 addressed to Grinnell Company reads, as follows:

> "Operation of a warehouse in Denver, Colorado from which Grinnell manufactured products and products purchased from others (being principally pipe, pipe fittings, hangers, plumbing and heating equipment) are sold within the territory of such company, including the State of New Mexico. Also operates as contractor selling and installing automatic sprinkler systems in its territory."

The same witness, speaking for his employer, Grinnell Company, in interrogatory No. 6, and asked to explain the relationship between it and Grinnell Company, Inc., stated:

> "A. Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell-manufactured materials from Grinnell Corporation and occasionally purchase Grinnell-manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation are the same. Three of the directors of Grinnell Corporation, namely, James D.

Fleming, Clarence H. Rison and Roger T. Clapp, constitute the entire board of directors of Grinnell Company and Grinnell Company, Inc. The books and records of Grinnell Company are entirely separate from the books and records of Grinnell Corporation and all employees of Grinnell Company are paid solely by Grinnell Company and receive no compensation from Grinnell Corporation."

Again, the same witness, speaking now as Secretary of Grinnell Company, Inc., in reply to an interrogatory addressed to that company as to the number of states in which it did business, answered:

"Delaware, Alabama, Arkansas, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Oklahoma, Ohio, Rhode Island, South Carolina, Tennessee, Texas. Qualified in all of the above states. Does business in no other states."

Likewise, the same witness, speaking still as Secretary of Grinnell Company, Inc., gave verbatim the same answer, substantially, as he had to a like inquiry directed to him while speaking as Secretary of Grinnell Company, touching the relationship of the three companies, to-wit:

"Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell manufactured materials from Grinnell Corporation and occasionally purchase Grinnell manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell Company, Inc. and Grinnell Corporation are the same. Three of the

Board of Directors of Grinnell Corporation constitute the entire boards of directors of Grinnell Company and Grinnell Company, Inc."

In the advertising done by the three companies, a common pattern is observed. The petitioners for the writ (relators)—the three of them—are treated as one. Actually, they hold out the name of "Grinnell" to the public and operate as one; a sample of such advertising is attached as Exhibit 17. It is put out under the trade name, "Grinnell." On the last page of this advertising circular appears the heading "Grinnel Sales Offices and Warehouses" under which are listed 34 offices and warehouses including the one at Denver, Colorado. The warehouse in Denver is the sole business of Grinnell Company. No distinction seems to be made between the manufacturing corporation or the various other so called selling corporations.

In addition, we have before us, brought up as an exhibit below, a huge catalogue in which countless articles manufactured and sold by this triumvirate of companies are listed, described and priced. It is described on the outside front cover "Grinnell—Wherever Piping is Involved—Catalog 51."

On the inside of the catalog, at approximately page 5, there is this statement:

"A partnership formed between a patternmaker and a carpenter in 1850 under the name of the Providence Steam & Gas Co., occupying a 40 x 60 foot section of the machine shop of the Providence and Worcester Railroad at Providence, Rhode Island, grew up to be the *Grinnell of today, with seven manufacturing plants and twenty-nine warehouses and*

sales offices located at strategic points throughout the United States and Canada.

"*Through its Supply Sales Division, which operates its Branch warehouses,* the Company sells both Grinnell manufactured and purchased piping products to a wide variety of customers, * * *." (Emphasis added.)

But, why go on? Enough has been shown (and more appears) to demonstrate that, although the three companies are separately incorporated, their separate entities are not preserved in the conduct of their overall business sufficiently to enable them to thrust same forward successfully in a claim of immunity to suit in this state.

A more liberal policy has grown up over the years with respect to what affords due process as to a foreign corporation doing business in another state than that of its creation. Especially is this true in setting up criteria by which its activities are to be judged in a determination whether it is doing business within a sister state, so as to subject it to suits in the courts of such state. See the illuminating opinion of Mr. Chief Justice Stone in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057, and annotation at 1068.

But this case does not on its facts exactly fit the situation here confronting us. There is here no question but that good service has been made on Grinnell Company. Sufficiency of service on it alone, however, brings little comfort to the plaintiff in the action out of which this proceeding in prohibition grows, unless through the agency of such service others may be brought before the court. The plaintiff

in the action sought to be prohibited must go beyond Grinnell Company and, indeed, to the parent corporation, if he is to have practical relief. This means he must establish service on Grinnell Company, Inc., or Grinnell Corporation, one or both, if he is to be afforded practical relief.

We think under the facts here present it could well be concluded that the parent organization, itself, Grinnell Corporation, was doing business in New Mexico through the agency of one of its subsidiaries, Grinnell Company, and that service on the latter sufficed to authorize the court, upon proper request, to bring before the court by amendment the two counterparts of Grinnell Company, to wit, Grinnell Company, Inc., and Grinnell Corporation. There is ample authority to support such a conclusion. See Compania de Astral, S. A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 108 A.2d 372, 49 A.L.R.2d 646, and annotation at page 668; Pergament v. Frazer, D.C., 93 F.Supp. 9; Clover Leaf Freight Lines, Inc., v. Pacific Coast Wholesalers Ass'n, 7 Cir., 166 F.2d 626; Bach v. Friden Calculating Machine Co., 6 Cir., 167 F.2d 679; S. O. S. Co. v. Bolta Co., D.C., 117 F.Supp. 59; General Electric Co. v. Masters Mail Order Co., 122 F.Supp. 797; Industrial Research Corporation v. General Motors Corporation, D.C., 29 F.2d 623; Fish v. East, 10 Cir., 114 F.2d 177; Sterling Novelty Corp. v. Frank & Hirsch Distributing Co., Ltd., 299 N.Y. 208, 86 N.E.2d 564, 12 A.L.R. 2d 1435; Sales Affiliates, Inc., v. Superior Court for Los Angeles, 96 Cal.App.2d 134, 214 P.2d 541; Fielding v. Superior Court, 111 Cal.App.2d 490, 244 P.2d 968, certiorari denied, Westwood Pharmacal Corp. v. Fielding, 344 U.S. 897, 73 S.Ct. 277, 97 L.Ed. 693.

Appendix A.

In S. O. S. Co. v Bolta Co, the court said [117 F.Supp. 61]:

"A circular distributed by the Bolta companies upon the introduction of the Scour Puss appears following page 5 of the plaintiffs' brief. In this circular the principal products of all of the Bolta companies were referred to. No distinction was made between the several companies but the advertisements were carried under the heading 'Bolta proudly presents.' From this and the other advertising appended to the plaintiffs' brief, it is clear that all of the Bolta products were presented in advertising to the public without identification of the particular Bolta companies dealing in the several products.

* * *

"Notwithstanding the common advertising, all sales, billings and bookkeeping records of the Bolta companies are confined to the company which is associated with the particular product.

* * * * * *

"Plaintiffs rely upon the strong line of recent cases typified by Clover Leaf Frieght Lines v. Pacific Coast Wholesalers Association, 7 Cir., 1948, 166 F.2d 626; Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association, 247 U.S. 490, 38 S.Ct. 553, 62 L.Ed. 1229; and Blum v. Postal Telegraph, Inc., D.C.Pa. 1944, 54 F.Supp. 898.

* * * * * *

"The defendants seek to distinguish the application of these cases by pointing out that they involved a wholly owned and controlling subsidiary, whereas in the instant case no such relationship exists. The application of the principal to a mechanical identity in the nature of the relationship cannot be restricted. It is true that here there is an ingenious variant in the usual method of control; yet it is no

less effective and real. It is accomplished through a family group supplemented by a management contract in the control of the founder of the business.
* * *

"It follows, therefore, that service upon the agent of Bolta Products Sales, Inc. was practical and sufficient service upon all of the Bolta companies."

We quote from Satterfiield v. Lehigh Valley R. R. Co., supra [128 F.Supp. 671], as follows:

"I believe that Millard was 'doing business' in this district within the meaning of 28 U.S.C. § 1391(c). The issue in every case is whether the nature of the foreign corporation's contacts with the judicial district in which it is sued is sufficient to justify subjecting it to suit in that district. Cf. Perkins v. Benguet Consolidated Mining Co., 1952, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485; International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. In this case Millard's contacts with this district arise out of the activities of R. D. Bates Co. Bates is in effect Millard's sales agent in New York City. The fact that Bates is an independent business organization which receives its compensation in the form of a 'commission' rather than a salary is not controlling. Latimer v. S/A Industrias Reunidas F. Matarazzo, 2 Cir., 175 F.2d 184, certiorari denied, 1949, 338 U.S. 867, 70 S.Ct. 141, 94 L.Ed. 531; Arpad Szabo v. Smedvig Tankrederi A.S., D.C.S.D.N.Y. 1951, 95 F.Supp. 519; cf. Bomze v. Nardis Sportswear, Inc., 2 Cir. 1948, 165 F.2d 33; Sterling Novelty Corp. v. Frank & Hirsch Distributing Co. (Pty.) Ltd., 1949, 299 N.Y. 208, 86 N.E.2d 564, 12 A.L.R.2d 1435. Millard's continuous and long continued activities in this district by which its products are sold through R. D. Bates Co. justify its

being sued in this district even though the suit is not based on a transaction which occurred in this district. * * *

"The remaining question deals with the validity of the manner in which the alleged service of process on Millard was effected. Process was served on an office manager of R. D. Bates Co., one E. H. Johnson. It is well settled that service on the agent whose activities establish that defendant is doing business in the district is sufficient service on the foreign corporation. * * *."

In Bishop v. United States, 16 F.2d 410, 415, the 8th Circuit Court of Appeals said:

"It is well-settled law, as stated by this court in Chicago Mill & Lumber Co. v. Boatmen's Bank, 234 F. 41, 45, that 'when one corporation owns or controls the entire property of another, and operates its plant and conducts its business as a department of its own business, or as its alter ego, it is responsible for its obligations incurred in so doing.' "

The case most relied upon by relators is that of Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 45 S.Ct. 250, 251, 69 L.Ed. 634. The court simply held there that the separation of corporate identity had been sufficiently maintained and on that theory that the defendant sued was not doing business in the jurisdiction of the forum where sued. Said the court:

"The corporate separation, though perhaps merely formal, was real. It was not pure fiction. There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defend-

> ant. Hence, cases concerning substantive rights, like Hart Steel Company v. Railroad Supply Co., 244 U.S. 294, 37 S.Ct. 506, 61 L.Ed. 1148, [other citations omitted] have no application."

The quoted language itself distinguishes that case from this one. The Cannon Mfg. Co. case held that if sufficient separateness between the parent and the subsidiary was maintained, the foreign parent was not subject to the local jurisdiction. However, as pointed out in the article in 56 Cal.L.Rev. 394, at p. 409:

> "The doctrine has been narrowed down by more liberal findings by the courts as to when the parent and its subsidiary are so conducting their affairs that they are no longer separate entities, but merely principal and agent in one organization.
> * * *
>
> "The courts will also take account of representations of a corporation as to where it is conducting its operations. For example, one case has held that where a parent company has represented in its literature that it has an office in a state in which only its subsidiary is engaged in activities, the parent should be taken at its word and be subject to suit in the local forum. Gray v. Eastman Kodak, D.C.E.D.-Pa. 1930, 53 F.2d 864."

In a seven-page comment on the Cannon Mfg. Co. case, supra, the author says that the result "shocks one's common sense." 20 Ill. L.Rev. 281 (1925).

In their reply brief counsel for relators, themselves, have this to say:

> "In the instant case, it is admitted that the activities of Grinnell Company constitute doing business in New Mexico within the rule of *International Shoe* and the only question in this proceeding is whether or not the Grinnell Company is the *alter ego* of Grinnell Corporation and/or Grinnell Company, Inc."

Since this is exactly the situation confronting us here and the service on Grinnell Company is admittedly good, this brings before the Court the two missing corporations, each as an *alter ego* of Grinnell Company, the case only lacking the formality of an amendment to add them as parties defendant.

It follows from what has been said that the alternative writ was improvidently issued and should, therefore, be discharged.

It will be so ordered.

LUJAN, C. J., and McGHEE COMPTON and KIKER, JJ., concur.

APPENDIX B

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and

HARTFORD ACCIDENT AND INDEMNITY CO.

Plaintiffs

-vs- NO. 63674

GRINNELL COMPANY

Defendant.

ORDER

Now upon Defendant's motion for summary judgment, motions to quash service of Grinnell Corporation and Grinnell Company, Inc., and the Court having heard the arguments of counsel and being fully advised in the premises thereupon;

IT IS ORDERED:

That said motions be and the same hereby are denied all of which the moving parties object and except.

s/ D. A. MacPherson, Jr.
District Judge

APPENDIX C

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and
HARTFORD ACCIDENT AND INDEMNITY CO.,

Plaintiffs,

vs. NO. 63674

GRINNELL COMPANY,

Defendant.

ANSWERS OF GRINNELL COMPANY TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

1. Q. Please state the name and title of the person answering these interrogatories.

   A. Roger T. Clapp, Secretary.

2. Q. What is your business address?

   A. 260 West Exchange Street, Providence, Rhode Island.

3. Q. In what business is the Grinnell Company presently engaging? Kindly describe generally what the Company does as a business, and the manner in which the same is conducted.

A. Operation of a warehouse in Denver, Colorado, from which Grinnell manufactured products and products purchased from others (being principally pipe, pipe fittings, hangers, plumbing and heating equipment) are sold within the territory of such company, including the State of New Mexico. Also operates as contractor selling and installing automatic sprinkler systems in its territory.

4. Q. Please state the names of each and every State in which your Company is authorized to do business.

A. New Mexico and Utah.

5. Q. Kindly state the name of the State in which this Company was first organized as a Corporation, and whether or not said State is still the place of residence of said Corporation.

A. Colorado. Said State is its present "place of residence."

6-27 See Interrogatories for questions.

A. Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell manufactured materials from Grinnell Corporation and occasionally purchase Grinnell-manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation are the same. Three of the directors of Grinnell Corporation, namely, James D. Fleming, Clarence H.

Rison and Roger T. Clapp, constitute the entire board of directors of Grinnell Company and Grinnell Company, Inc. The books and records of Grinnell Company are entirely separate from the books and records of Grinnell Corporation and all employees of Grinnell Company are paid solely by Grinnell Company and receive no compensation from Grinnell Corporation.

28. Q. For what specific purpose, or purposes, is Grinnell Company qualified to do business in the State of New Mexico?

A. All purposes.

29. Q. Kindly state the date that Grinnell Company became qualified to do business in the State of New Mexico, and whether or not Grinnell Company has ever forfeited its right to do business in the State of New Mexico.

A. November 8, 1951. Still in effect.

30. Q. Did Grinnell Company ever sell any steel clamps, pipe hangers or I beam holders, or like products in the State of New Mexico? If so, kindly state:

A. Yes.

30-a Q. The name of the manufacturers of said clamps, hangers, holders, or similar devices.

A. Grinnell Corporation and Columbia Malleable Castings Corporation.

30-b Q. From whom Grinnell Company purchased said hangers, clamps, holders, or like products.

A. Grinnell Corporation and Columbia Malleable Castings Corporation.

30-c Q. Has Grinnell Company ever sold to any persons or firms for use, or which might have been used in the REA Plant at Algodones, New Mexico, or in the construction thereof. If so, kindly state full details.

A. Not to our knowledge.

31. Q. Did Grinnell Company ever make an investigation of the accident of January 11, 1954, at the REA Electrical Plant at Algodones, New Mexico, in which the plaintiff was injured?

A. No.

32. A. Not Applicable.

36. Q. Kindly state in detail the relationship of the executive office of Grinnell Corporation at Providence, Rhode Island, to the Grinnell Company. If any orders, directions, suggestions or advices followed by Grinnell Company originate in said executive office, kindly explain in full detail.

A. See answer to questions 6-27 above.

37. Q. Does Grinnell Company manufacture any products, whatsoever? If so, kindly specify.

A. No.

38. Q. Did Grinnell Company sell any products to Flori Pipe Company, or to Flori Piping Erection Company in the year 1953, or late in the year 1954?

A. No.

39. Q. Kindly state the name and address of each and every wholesaler, distributor, jobber, or retailer of Grinnell Company in the year 1953, and prior to January 11, 1954, in the State of New Mexico.

A. Albuquerque Lumber Co.
501 North First Street
Albuquerque, New Mexico

Construction Supply Co.
716 East Main Street
Farmington, New Mexico

Crane Company
612 North First Street
Albuquerque, New Mexico

Charles Ilfeld Co.
Las Vegas,
New Mexico

Southland Supply Co.
Box 1051
Lovington, New Mexico

Brown Pipe & Supply Co.
P. O. Box 35
Artesia, New Mexico

Barry Hardware Co.
Clovis
New Mexico

Crane Company
102 South Virginia Street
Roswell, New Mexico

New Mexico Timber Co.
P. O. Box 63
Albuquerque, New Mexico

Union Industrial Corporation
P. O. Box 710
Carlsbad, New Mexico

40. Q. Kindly state whether or not Grinnell Company has ever sold any pipe hangers, holders or I beam clamps, such as is in question in the present suit, to Sterns-Rogers Company for use in the Albuquerque area during the year 1953, or the year 1954.

A. Some hangers, some 266-5 clamps and other supporting materials were sold to Stearns-Roger Mfg. Co., care of Public Service Company of New Mexico, Person Station, Albuquerque, New Mexico. No shipments were made where the shipment would terminate in Algadones, New Mexico, or at any REA plant.

43. Q. If you have any knowledge concerning a metal hanger used upon Electric Co-op, Algodones, New Mexico, please answer the following:

A. This company has no knowledge.

44. Q. The Third Defense which you have filed herein alleges that the plaintiff had knowledge of, and assumed the risk in question. Kindly state in complete detail, the facts upon which defense is predicated.

A. Mr. Schultz by sitting on the pipe together with another man and attempting to move the pipe through the rings, a procedure in violation of sound practices, created a danger that some part of the equipment used in hanging pipe might break. When further facts regarding this accident are ascertained, additional facts regarding the Third Defense may be uncovered but at the moment the above are all the facts relied on.

45. Q. The Fourth Defense which you have filed herein alleges that the plaintiff was guilty of contributory negligence in connection with said defense. Please state each and every fact upon which said defense is predicated, and the facts upon which you intend to prove such contributory negligence.

A. Mr. Schultz by sitting on the pipe together with another man and attempting to move the pipe through the rings, a procedure in violation of sound practices, created a danger that some part of the equipment used in hanging pipe might break. When further facts regarding this accident are ascertained, additional facts regarding the Fourth Defense may be uncovered but at the moment the above are all the facts relied on.

46. Q. The Fifth Defense asserted in this cause of action was that the accident was unavoidable. Kindly relate in detail the facts upon which the defense is predicated, as well as all facts upon which you intend to prove such defense at the time of trial.

A. Mr. Schultz by sitting on the pipe together with another man and attempting to move the pipe through the rings, a procedure in violation of sound practices, created a danger that some part of the equipment used in hanging pipe might break. When further facts regarding this accident are ascertained, additional facts regarding the Fifth Defense may be uncovered but at the moment the above are all the facts relied on.

47. Q. In reference to the steel pipe which was being hung at the time of the accident in question:

a. The nature of the work being done on the pipe at the time of the accident.

b. The size and length of said pipe.

c. State the exact nature, number and placing of hangers supporting said pipe. Attach a sketch or drawing to your answer.

A. We have no information at the present time in answer to this question other than that contained in the deposition of Larnie Schultz.

48. Q. State the names and present addresses of all witnesses whom you intend to call to testify in your behalf when this matter is brought to trial, and in connection therewith, give the nature of the testimony expected from each such witness.

A. At the present time we have no knowledge of witnesses whom we intend to call to testify. When we have ascertained who will be called, we will give the information called for to you.

49. Q. Does your company publish a circular or catalog, or other advertisement listing a clamp such as was involved in the accident in question, and, if so, please attach hereto a copy of all such material.

A. Yes. Copy attached.

50. Q. If Grinnell Company, or any of its subsidiaries, or related companies sold the hanger in question, please state the name of the salesman or representative with whom such sale was discussed, negotiated or effected.

A. The only information we have is that information contained in the affidavit of Quincy N. Peckham, Manager of Grinnell Company, Inc., which affidavit has been heretofore filed in this cause. The name of the salesman or representative if there were such a person involved in the transaction, does not appear on the invoices.

s/ R. T. CLAPP

ROGER T. CLAPP

Appendix C.

STATE OF RHODE ISLAND

County of Providence . . . . ss

The foregoing instrument was acknowledged before me this 27th day of August, 1956, by ROGER T. CLAPP, Secretary of Grinnell Company, a Colorado corporation, on behalf of said corporation.

s/ Dorothy E. Reaney

Notary Public

My commission expires June 30 1961

WE HEAREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO OPPOSING COUNSEL OF RECORD THIS 8-30-56
RODEY, DICKASON, SLOAN, MIMS & AKIN

By s/ Jackson G. Akin

APPENDIX D

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and
HARTFORD ACCIDENT AND INDEMNITY CO.,

Plaintiffs,

vs. NO. 63674

GRINNELL COMPANY,

Defendant.

ANSWERS OF GRINNELL COMPANY, INC. TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

1. Roger T. Clapp, Secretary.

2. Sixteen (16) years.

3. Delaware, Alabama, Arkansas, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Oklahoma, Ohio, Rhode Island, South Carolina, Tennessee, Texas. Qualified in all of the above states. Does business in no other states.

4. Prior to 1951 New Mexico was within the territory served by Grinnell Company, Inc. When the Denver Warehouse was built and Denver and surrounding territory established as an area to be operated by Grinnell Company, a Colorado corporation, which was incorporated July 31, 1951, New Mexico became thereafter territory exclusively served by Grinnell Company.

5. No real estate ever owned by this company in New Mexico. No office ever maintained by this company in New Mexico. Prior to 1951 this company at times installed sprinkler systems in New Mexico and in connection therewith had personal property, to-wit: materials, tools, etc., in New Mexico. After the incorporation of Grinnell Company in 1951 installation of sprinkler systems in New Mexico became thereafter an exclusive function of Grinnell Company.

6. No.

7. 1919. Delaware, still domiciled in Delaware.

8. None.

9. No.

10.-15. Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell manufactured materials from Grinnell Corporation and occasionally purchase Grinnell manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell

Company, Inc. and Grinnell Corporation are the same. Three of the Board of Directors of Grinnell Corporation constitute the entire boards of directors of Grinnell Company and Grinnell Company, Inc.

16. No.

20. See answer to interrogatories 10-15 above.

s/ R. T. CLAPP

ROGER T. CLAPP

STATE OF RHODE ISLAND
County of Providence . . . ss

The foregoing instrument was acknowledged before me this 27th day of August, 1956, by ROGER T. CLAPP, Secretary of Grinnell Company, Inc., a Delaware corporation or behalf of said corporation.

(Seal)

s/ Dorothy E. Reaney

Notary Public

My commission expires June 30 1961

WE HEAREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO OPPOSING COUNSEL OF RECORD THIS 8-30-56
RODEY, DICKASON, SLOAN, MIMS & AKIN

By s/ Jackson G. Akin

APPENDIX E

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and

HARTFORD ACCIDENT AND INDEMNITY CO.,

Plaintiffs

vs. NO. 63674

GRINNELL COMPANY,

Defendant.

ANSWERS OF GRINNELL CORPORATION TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

1. Roger T. Clapp, Secretary and Counsel.

2. Sixteen (16) years.

3. I am Secretary of Grinnell Company, Inc., and Grinnell Company but receive no compensation from these companies for this service. Otherwise I have never been employed by the Grinnell Company, Inc., or the Grinnell Company.

4. There are no employees employed by Grinnell Corporation who are also employees of Grinnell Company or Grinnell Company, Inc. The number of employees of Grinnell Corporation who

have been employees of Grinnell Company or Grinnell Company, Inc. is negligible.

5. Yes, Grinnell Company, Inc. and Grinnell Company are wholly owned subsidiaries of Grinnell Corporation.

6. Manufacture and sale of pipe, valves, fittings, hangers, automatic sprinkler systems, power and process piping systems, industrial humidification systems.

7. Delaware.

8. Georgia, New York, North Carolina, Ohio, Pennsylvania and Rhode Island.

9. No.

10. No.

11. No.

12. Not applicable.

s/ R. T. CLAPP

ROGER T. CLAPP

Appendix E.

STATE OF RHODE ISLAND
County of Providence . . . ss

The foregoing instrument was acknowledged before me this 27th day of August, 1956, by ROGER T. CLAPP, Secretary of Grinnell Corporation, a Delaware corporation, on behalf of said corporation.

(Seal)

s/ Dorothy E. Reaney

Notary Public

My commission expires June 30 1961

WE HEAREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO OPPOSING COUNSEL OF RECORD THIS 8-30-56

RODEY, DICKASON, SLOAN, MIMS & AKIN
By s/ Jackson G. Akin